

1 UNITED STATES DISTRICT COURT FOR THE
2 WESTERN DISTRICT OF PENNSYLVANIA

3 JOSE TORRES, ET AL.,)

4 *Plaintiffs,*)

5 v.)

6 NANCY GIROUX, ET AL.,)

7 *Defendants.*)
8)
9)

CASE No. 1:15-cv-00174-BR-SPB

ORDER REGARDING
REPORT AND
RECOMMENDATION

10 **I. INTRODUCTION**

11 Pursuant to Local Civil Rule 72, Magistrate Judge Susan Baxter filed a Report and
12 Recommendation on October 16, 2015 [Dkt. No. 19]. She recommended that this Court dismiss
13 Raymond Gourgue, Albaro Alvarez, James Edwards, and Sibney Martin as Plaintiffs in this case
14 for failure to prosecute. Sibney Martin filed an Objection to the Report and Recommendation on
15 November 2, 2015. Dkt. No. 30. On March 17, 2016, Plaintiff Gourgue voluntarily withdrew
16 from the case. Dkt. No. 38. Having reviewed the Report and Recommendation, Plaintiff Martin's
17 Objection, and the underlying record, the Court will ADOPT the Report and Recommendation as
18 to Plaintiffs Alvarez and Edwards and DECLINE to adopt the Report and Recommendation as to
19 Plaintiff Martin. The reasoning for this Court's decision is set forth below.

20 **II. BACKGROUND**

21 Plaintiffs Jose Torres, Raymond Gourgue, Albaro Alvarez, Michael Pernell, Shawarrde
22 Fitzgerald, James Edwards, Jhen Scutella, and Sibney Martin filed a civil rights complaint on

1 July 17, 2015. Dkt No. 1. With the Complaint, only Plaintiff Torres filed a motion to proceed *in*
2 *forma pauperis*. Consequently, Judge Baxter issued a Show Cause Order directing the other
3 Plaintiffs to either pay the filing fee or file a motion to proceed *in forma pauperis*, on or before
4 September 15, 2015. Dkt. No. 3 at 1. At the time of filing the Report and Recommendation, only
5 Plaintiffs Pernell, Fitzgerald, and Scutella responded to the Show Cause Order. Dkt. No. 13; Dkt.
6 No. 14; Dkt. No. 15. The other four remaining Plaintiffs, Gourgue, Alvarez, Edwards, and
7 Martin, failed to comply with the Show Cause Order.

8 Using the balancing test outlined in *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d
9 863 (3d Cir. 1984), Judge Baxter recommended Plaintiffs Gourgue, Alvarez, Edwards, and
10 Martin be dismissed from the case for a failure to comply with the Court's Show Cause Order.
11 Dkt. No. 19 at 2. After Judge Baxter issued the Report and Recommendation, acting on his own
12 behalf, and ostensibly acting on behalf of Gourgue, Alvarez, and Edwards, Plaintiff Martin
13 objected to the Report and Recommendation. Dkt. No. 30 at 2. In the Objection, Martin alleges
14 that the Plaintiffs are separated from one another and are unable to communicate concerning the
15 details of their case. Dkt. No. 30 at 1. He also addresses correspondence he received from the
16 Clerk of Court dated September 22, 2015. Martin did not, however, explain why he failed to
17 respond to the Show Cause Order. In addition, as noted above, on March 17, 2016, Plaintiff
18 Gourgue voluntarily withdrew from the case. Dkt. No. 38.

19 **III. DISCUSSION**

20 The Federal Rules of Civil Procedure authorize the referral of dispositive motions to a
21 Magistrate Judge for a report and recommendation. When a party files written objections to any
22 part of the Recommendation, the Court considers *de novo* those portions of the Recommendation

1 to which objections have been made, and “may accept, reject, or modify the recommended
2 decision[.]” Fed. R. Civ. P. 72(b).

3 A district court may dismiss a case *sua sponte*, but should do so with caution. *See Briscoe*
4 *v. Klaus*, 538 F.3d 252, 258 (3d Cir. 2008) (citing *Donnelly v. Johns-Manville Sales Corp.*, 677
5 F.2d 339, 341 (3d Cir. 1982)). When determining whether or not to dismiss, a court is required to
6 use a six-factor balancing test. *Poulis*, 747 F.2d at 868. The court must consider:

7 (1) the extent of the *party's* personal *responsibility*; (2) the
8 *prejudice* to the adversary caused by the failure to meet scheduling
9 orders and respond to discovery; (3) a *history* of dilatoriness; (4)
10 whether the conduct of the party or the attorney was *willful* or in
bad faith; (5) the effectiveness of sanctions other than dismissal,
which entails an analysis of *alternative sanctions*; and (6) the
meritoriousness of the claim or defense."

11 *Briscoe*, 538 F.3d at 258 (quoting *Poulis*, 747 F.2d at 868 (emphasis in original)). With these
12 factors in mind, the Court will provide Plaintiff Martin with one final opportunity to comply with
13 the Show Cause Order. In arriving at this conclusion the Court focused on the first and fourth
14 *Poulis* factors.

15 **A. The extent of the party’s personal responsibility**

16 The Third Circuit has routinely held a *pro se* plaintiff “responsible for his failure to
17 attend a pretrial conference or otherwise comply with a court’s orders.” *See generally Briscoe*,
18 538 F.3d at 258 (referencing *Emerson v. Thiel Coll.*, 296 F.3d 184, 191 (3d Cir. 2002)).
19 However, if the record is insufficient to support a finding that the plaintiff was personally
20 responsible for failing to comply with the orders of the court, the court should provide the
21 plaintiff an opportunity to explain his failure, “thus gathering a full understanding of the facts.”
22 *Briscoe*, 538 F.3d at 259.

1 Here, Martin alleges that, due to their current incarceration status, the Plaintiffs are
2 unable to communicate regarding their case. Specifically, Martin alleges that he is unable to
3 communicate with Plaintiff Torres, the head Plaintiff in this case. *See* Dkt. No. 30 at 1. While he
4 does not explicitly address his failure to comply with the Show Cause Order, the Court presumes
5 that Martin is suggesting that his inability to communicate with the other Plaintiffs in this case
6 has made it difficult for him to remain abreast of what he personally needs to do in order to keep
7 the case moving forward or that he thought Torres' filings would be effective on his behalf.
8 Such allegations suggest that Martin's failure to comply with the Show Cause Order was due to
9 circumstances beyond his personal responsibility.

10 **B. Whether the conduct of the party or the attorney was willful or in bad faith**

11 This factor requires the Court to consider "whether the conduct was the type of willful or
12 contumacious behavior which was characterized as flagrant bad faith." *Id.* at 262 (quoting *Adams*
13 *v. Trs. of the N.J. Brewery Emps.' Pension Trust Fund*, 29 F.3d 863, 875 (3d Cir. 1994) (internal
14 quotation marks omitted)). Willful conduct involves "intentional or self-serving behavior." *Id.*
15 Negligent or inadvertent conduct is not considered contumacious. *Briscoe*, 538 F.3d at 262.

16 The record does not indicate that Martin's conduct was "willful" or done
17 "contumaciously." In fact, while Martin suggests that his successful prosecution of this case was
18 impeded by his alleged inability to communicate with the other Plaintiffs, it also appears that
19 Martin's failure to comply with the Show Cause Order was due to his misunderstanding the
20 Order. In his Objection to the Report and Recommendation, not once does Martin comment on
21 the Show Cause Order. Rather, it appears, he believes that Judge Baxter recommended his
22 dismissal from the lawsuit because he failed to submit a form from the Clerk of Court in which

1 he was supposed to indicate whether he consented to having the case proceed before a Magistrate
2 Judge. Presumably in an effort to correct his noncompliance, Martin submitted this signed form
3 with his Objection. *See* Dkt. No. 29.

4 **C. Remaining Plaintiffs**

5 In the conclusion section of the Objection, Martin requests that the Court not dismiss
6 himself “and the other Plaintiffs.” Dkt. No. 30 at 2. Presumably Martin is referring to Alvarez
7 and Edwards, the remaining Plaintiffs who did not comply with the Show Cause Order. These
8 Plaintiffs did not, on their own, file any objections to the Report and Recommendation. In
9 addition, nearly six months have passed since the Report and Recommendation was issued and
10 Alvarez and Edward still have not sought to proceed in *forma pauperis* or pay the requisite
11 filing. Accordingly, they will be dismissed from the case.

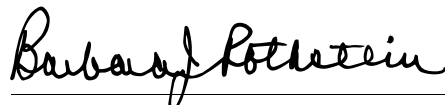
12 **IV. CONCLUSION**

13 Based on the foregoing reasons, the Court adopts the Report and Recommendation as to
14 Plaintiffs Alvarez and Edwards. Plaintiffs Alvarez and Edwards are hereby DISMISSED from
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1 this case. The Court declines to adopt the Report and Recommendation as to Plaintiff Martin.
2 **Plaintiff Martin is instructed to file a motion to proceed *in forma pauperis* with the**
3 **accompanying institutional account statement or pay the requisite filing fee on or before**
4 **May 4, 2016. FAILURE TO DO SO WILL RESULT IN DISMISSAL FROM THIS CASE.**

5 **IT IS SO ORDERED.**

6 DATED this 4th day of April, 2016.

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9 Barbara Jacobs Rothstein
10 U.S. District Court Judge
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